

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

STEPHEN BURINSKY,
Appellant,
v.
DEPARTMENT OF NATURAL RESOURCES,
Respondent.

) Case No. DEMO-02-0040
)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD
)
)
)
)
)
)

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held in the Board Room at the Lower Columbia College in Longview, Washington, on November 18 and 19, 2003. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Stephen Burinsky was present and represented himself *pro se*. Mark Anderson, Assistant Attorney General, represented Respondent Department of Natural Resources.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty. Respondent alleges that Appellant directed the planting of tree seedlings in the wrong geographical area, which resulted in a significant financial loss to the Department of Natural Resources.

II. FINDINGS OF FACT

2.1 Appellant is a permanent employee for Respondent Department of Natural Resources (DNR). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on December 31, 2002.

2.2 At the time of his demotion, Appellant was an Intensive Management Forester 1. Appellant was appointed to his position on August 18, 1999. As a Forester 1, Appellant's duties included overseeing work crews during the planting of tree seedlings for the establishment of new timber stands in previously logged areas.

2.3 Appellant has received no prior formal discipline; however, his personnel file includes the following:

- A February 14, 2000 letter of reprimand for exercising poor judgment and failing to follow supervisor's directions.
- An October 11, 1999 letter to document a meeting between Appellant and his supervisor after Appellant failed to follow his supervisor's advice and subsequently lost two pagers within one week.
- Beginning in the fall of 2000, Appellant's supervisor conducted a series of six-week performance feedback sessions for the purpose of providing coaching and counseling regarding his duties as a Forester 1.

2.4 By letter dated November 15, 2002, Mr. Ray Lasmanis, Southwest Region Manager, informed Appellant of his demotion to a position as a Forest Technician effective December 1, 2002. Mr. Lasmanis charged Appellant with neglect of duty.

1
2
3 2.5 Respondent alleged that on May 24, 2002, Appellant mistakenly directed the planting of tree
4 seedlings in DNR's Southwest Region. Instead of planting the seedlings in the Follicle timber sale
5 unit as scheduled, Appellant directed the seedlings be planted in the adjoining Split Ends timber
6 sale unit. Appellant did not realize the wrong unit was being planted until the third day of planting,
7 when he immediately notified his supervisor of the error. The disciplinary letter stated as follows:

8
9 On May 14, 2002, Bob Eggett informed you that he had flagged the route to the Follicle unit
10 at each intersection with red/white candy striped ribbons, specifically at the entrance and
11 exit of each intersection. Bob also told you to obtain a map before going into the Follicle
12 unit and you indicated that you would.

13 As a Forester 1 in the Intensive Management Program, it is your job duty to discuss the
14 Work Plan with the Crew Supervisor before the planting is started by the Camp Crews to
15 ensure that the instructions are clear and to provide any additional training or help in
16 facilitating the planting. The Work Plan contains a unit description, ... as well as a map of
17 the unit(s). Given the differences between the Follicle unit and Split Ends unit, an error
18 such as this would not have been made if the Work Plan and map were reviewed.

19 2.6 Respondent alleged that Appellant's actions of directing the planting of seedlings in the
20 wrong geographical area resulted in a significant financial loss to DNR for the following reasons:

- 21 • While planting the wrong unit, which was larger than the unit that should have been planted,
22 the planting crew ran out of seedlings. Appellant subsequently took seedlings intended for a
23 third unit, which resulted in a lack of available seedlings for the third unit.
- 24 • After expending funds for vegetation management to prepare the Follicle unit for a planting
25 that did not occur, the effectiveness of that preparation was reduced by at least 50 percent.
26 The result will be a growth loss once that unit is eventually planted, and may result in the
necessity to carry out additional vegetation management at an estimated cost of \$3,080.00.
- The newly planted seedlings on the Split Ends unit will experience growth reductions
because the unit had not received vegetation management preparation for planting. The
estimated cost of performing vegetation management on this site is \$6,230.00.

- Due to Appellant's error, portions of the Split Ends unit were planted with Noble fir. Since the higher-value Douglas fir is best suited for that site and would have grown better, DNR lost the potential value that could have been received from the higher-value species of Douglas fir trees.
- Mr. Eggett spent several hours making phone calls, reviewing seedling counts, and analyzing budget data in an effort to mitigate the negative consequences of Appellant's error. In addition, Mr. Steve Ogden and Mr. Florian Deisenhofer spent approximately three hours drafting the regeneration plan and a detailed map for the Follicle unit.

2.7 On April 7, 2003, the Board denied Respondent's Motion for Summary Judgment. At that time, the Board concluded there is no dispute that Appellant mistakenly directed the work crew to plant tree seedlings in the wrong location. The Board ruled that the only issues before the Board were whether Appellant's error constituted a neglect of his duty as a Forester 1, and whether the sanction imposed, a demotion, is appropriate under the facts and circumstances.

2.8 On August 8, 2002, Tami Riepe, SW Region HCP Implementation Manager, completed an investigation at Mr. Lasmanis' request, and she concluded that Appellant should have recognized he was on the wrong unit for the following reasons:

- The difference in size of the units - the Split Ends unit is twice as large as the Follicle unit.
- The missing rock pits - the Follicle unit has two rock pits that are located inside the unit and are identified on the map.
- The unit's road locations - one unit has roads located on the outer boundary and the other unit's roads are located to the interior.
- The effect of the site preparation spray - the Split Ends unit had not received vegetation management preparation while the Follicle unit had been site prepped.
- The aspect - the Split Ends unit has no south aspect as identified on the planting prescription for the Follicle unit.

2.9 By letter dated August 27, 2002, Mr. Lasmanis informed Appellant that the department was considering taking formal disciplinary action against him up to and including dismissal.

1 2.10 On October 25, 2002, Mr. Lasmanis conducted a meeting with Appellant and his
2 representatives to allow Appellant an opportunity to respond to the allegations.

3
4 2.11 In response to the allegations, Appellant asserted his mistake was partly due to a poorly
5 drawn sales area map that lacked road bjunctions. He also asserted he had trouble finding the route
6 into the sale area because the roads were not marked with numbers, which resulted in his inability
7 to find his way back to the heliport near the Follicle unit. Appellant asserted that other employees
8 could verify that the site map was inadequate. Appellant also questioned the manner in which the
9 department calculated the costs incurred as a result of the tree seedlings being planted in the wrong
10 unit.

11
12 2.12 Mr. Lasmanis reviewed Appellant's responses to the allegations and concluded that he had
13 failed to provide any mitigating circumstances for directing the work crew to plant tree seedlings in
14 the wrong location. Mr. Lasmanis determined that Appellant's actions clearly constituted neglect of
15 duty.

16
17 2.13 In determining the level of discipline, Mr. Lasmanis considered Appellant's responsibility to
18 ensure the correct unit was being planted, and that Appellant was not able to locate the site by
19 following Mr. Eggett's flagging. Further, Appellant did not follow his supervisor's instructions to
20 obtain an adequate map prior to leading the work crew to the unit, and then he failed to confirm that
21 he was in the proper unit before instructing the work crews to begin planting. Mr. Lasmanis also
22 considered the significant financial harm and impact that Appellant's negligence had caused DNR.

23
24 2.14 Mr. Lasmanis determined that Appellant demonstrated a complete lack of sound judgment
25 while exercising his duties. Mr. Lasmanis determined he could not trust Appellant to independently
26 perform the professional and skilled technical forestry assignments of a Forester 1. Mr. Lasmanis

1 considered terminating Appellant; however, he concluded that demotion to Forest Technician was
2 the appropriate sanction for Appellant's negligence. Mr. Lasmanis was confident that Appellant
3 would be closely supervised as a Forest Technician, and such a demotion would prevent recurrence
4 and deter others from similar neglect of duty.

6 **III. ARGUMENTS OF THE PARTIES**

7 3.1 Respondent argues it was Appellant's responsibility to ensure that the planting crew was led
8 to the correct unit, and that a standard part of forestry work is the ability to locate sites by following
9 maps and following flagging used to mark routes. Respondent contends that Appellant failed to
10 discuss the work plan with the crew supervisor, and the work plan contained a unit description and
11 a map. Respondent argues that Appellant negligently directed the planting of seedlings in an
12 incorrect unit that had not been prepared with the vegetation management process. Respondent
13 asserts that Appellant failed to comply with his supervisor's instructions to obtain an adequate site
14 map before leading the work crew to the planting unit.

15 Respondent contends that Appellant's negligence resulted in significant financial loss to
16 DNR. Respondent argues that Appellant failed to take responsibility for his negligence and cannot
17 be trusted to make judgments necessary in order to independently perform the duties of a Forester 1.
18 Respondent asserts that dismissal was warranted and contends the appointing authority was
19 extremely lenient by merely demoting Appellant. Respondent asks the Board to uphold the
20 disciplinary sanction of demotion.

21
22 3.2 Appellant argues he was not responsible for directing the work of the planting crew.
23 Appellant asserts he was unfamiliar with the roads, and the sales area map he used was not
24 sufficient guidance to assist him in locating the correct unit. Appellant contends the flags were not
25 properly placed and the route was poorly marked. Appellant argues that he discussed the work plan
26 with the planting crew supervisor. Appellant asserts that the vegetation management process of site

1 preparation is not required in every situation because each unit has its own unique environmental
2 needs. Appellant contends that DNR's estimate of the lost revenue is highly speculative, and the
3 actual impact was one unit planted one year early and one unit planted one year late with no
4 negative consequences.

5 Appellant argues he has supervised numerous correct and successful plantings in the past,
6 and this error represents less than two percent of the total acres he has been involved in planting
7 since 1999. Appellant asserts he will not repeat the mistake of attempting to locate a unit without a
8 map, and it is unlikely he will ever misplant a unit again. Appellant contends the punishment was
9 too harsh, and it would have been more appropriate for him to receive a letter of reprimand, be
10 suspended, or be allowed to reimburse the lost revenue to DNR. Appellant asks the Board to
11 reinstate him to his Forester 1 position with all back pay.

12 13 **IV. CONCLUSIONS OF LAW**

14 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
15 herein.

16
17 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
18 the charges upon which the action was initiated by proving by a preponderance of the credible
19 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
20 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
21 Corrections, PAB No. D82-084 (1983).

22
23 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
24 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
25 of Social & Health Services, PAB No. D86-119 (1987).

1
2 4.4 Respondent has met its burden of proving that Appellant had a duty to comply with his
3 supervisor's instructions to ensure he had an adequate site map to assist him in locating the
4 unfamiliar Follicle unit. Further, Appellant had a duty, as part of his job responsibilities, to direct
5 the planting crew to plant the correct unit. Appellant neglected his duty when he was not able to
6 find the correct site by map or flagging, and did not verify through visible signs and terrain that he
7 was at the incorrect site. Additionally, Appellant failed to recognize the unit he was in had not been
8 prepared with the vegetation management process, directed the planting of the wrong site, and did
9 not realize his mistake for three days, even after the planting crew had a considerable shortage of
10 seedlings.

11
12 4.5 Although it is not appropriate to initiate discipline based on prior formal and informal
13 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the
14 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.
15 D93-163 (1995).

16
17 4.6 In determining whether a sanction imposed is appropriate, consideration must be given to
18 the facts and circumstances, including the seriousness and circumstances of the offenses. The
19 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
20 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
21 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

22
23 4.7 After considering Appellant's negligence and the resulting adverse impact of significant loss
24 for the department, we conclude that the disciplinary sanction of demotion was not too severe and
25 was appropriate under the circumstances presented here. In light of Appellant's negligence, we
26 consider a demotion to be quite lenient.

1 4.8 Therefore, the appeal of Stephen Burinsky should be denied
2

3 **V. ORDER**

4 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Stephen Burinsky is denied.
5

6 DATED this _____ day of _____, 2003.
7

8 WASHINGTON STATE PERSONNEL APPEALS BOARD
9

10 _____
11 Gerald L. Morgen, Vice Chair
12

13 _____
14 Busse Nutley, Member
15
16
17
18
19
20
21
22
23
24
25
26